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Supreme Court of the United States

OCTOBER TERM, 1948

No. 413

GEORGIA RAIL ROAD & BANKING COMPANY, *Appellant,*

v.

DOWNING MUSGROVE, *Who is Revenue Commissioner of the State of Georgia, Appellee.*

Appeal from the Supreme Court of the State of Georgia.

BRIEF OF APPELLANT IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM.

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v.

DOWNING MUSGROVE, *Who is Revenue Commissioner of the State of Georgia, Appellee.*

Appeal from the Supreme Court of the State of Georgia.

BRIEF OF APPELLANT IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM.

In connection with his statement asserting grounds making against the jurisdiction of this Court, filed under Rule 12, paragraph 3, the appellee has included a motion to dismiss or affirm. Such motion was served on appellant on October 25, 1948. Appellant, within twenty days after such service, files this brief, pursuant to Rule 7, paragraph 3, opposing the motion to dismiss or affirm.

A.

THE OPINION OF THE COURT BELOW.

The opinion of the Supreme Court of the State of Georgia, pursuant to which that Court entered the final judgment which is the subject of this appeal, has not yet been officially reported. It is contained in the record but the record page cannot be given for the reason that this brief is being filed prior to the printing of the record. Such opinion may be found in 49 S. E. 2d (Adv.) 26.

B.

CONTENTIONS OF PARTIES ON PRINCIPAL ISSUE AS TO JURISDICTION.

I.

Appellee's position: State Court did not pass upon constitutional questions but merely held that appellant had chosen wrong remedy.

Construing the motion to dismiss or affirm most favorably to appellee, its main contention is that this is simply a case in which the highest Court of a State has held that a litigant chose the wrong remedy for asserting rights claimed under the Constitution of the United States. Appellee contends that, since appellant chose, as appellee claims, a remedy not open to it for asserting its constitutional claims, appellant can not get such claims reviewed by this Court in this suit. Appellee contends that in order for appellant to obtain review by this Court of its constitutional claims it must assert them in a suit based on a remedy provided by the State for such purpose. Appellee contends that the State has provided several remedies any one of which would afford appellant opportunity of presenting its constitutional

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claims to the State Courts for determination, and to this Court for final determination, if such claims are ruled on adversely to appellant by the Supreme Court of Georgia. Though appellee does not say so, its contention is evidently based on the ruling of this Court in *Copperweld Steel Co.* v. *Industrial Commission of Ohio*, 324 U. S. 780.

II.

Appellant's position: State Court's erroneous holding that this suit against wrongdoer was suit against State deprived appellant of only remedy to assert its constitutional claims and State Court thus upheld validity of State laws claimed repugnant to United States Constitution.

Appellant's contention on the other hand is, as shown by its jurisdictional statement, that there is not open to it any remedy which is plain, complete and beyond doubt except that upon which this suit is based, with the result that the Supreme Court of Georgia has, by the device of erroneously holding that this suit is a suit against the State as to which the State has not consented to be sued, upheld as valid the two Georgia laws which appellant claims are void as to it because violative of the Constitution of the United States. By the device of erroneously holding that this suit is a suit against the State as to which the State has not consented to be sued, when the fact is, as the complaint makes plain, that appellant has no other remedy which can meet the test of adequacy, the Supreme Court of Georgia has upheld as valid the two Georgia laws against appellant's claim of unconstitutionality just as effectively as if that Court had expressly and in terms upheld the offending Georgia laws. This appeal, therefore, comes squarely within the holding of this Court in *General Oil Co.* v. *Crain, Inspector of Coal Oil*, 209 U. S. 211.

C.

APPELLANT'S ARGUMENT ON PRINCIPAL ISSUE.

I.

This suit is not one against the State but is one against the Commissioner as a wrongdoer.

That this suit is not a suit against the State but is a suit against the Commissioner personally as a wrongdoer cannot at this late date be doubted. See, in addition to the cases cited on this point in the jurisdictional statement, the following: *Ex parte La Prade,* 289 U. S. 444; *Gorham Mfg. Co.* v. *Wendell,* 261 U. S. 1; *Allen, Collector of Internal Revenue for the District of Georgia,* v. *Regents of University System of Georgia,* 304 U. S. 439; and *The Pullman Company* v. *Crum, Comptroller of the State of Florida,* 231 U. S. 571.

II.

Though denominated a declaratory judgment action, this suit in substance and effect is one in equity seeking full and primary equitable relief.

The motion to dismiss or affirm erroneously assumes that the decision of the Supreme Court of Georgia turned upon the fact that this suit was self-styled (Paragraph 27 of the complaint) a suit authorized by the Georgia Declaratory Judgments Act of 1945 (Ga. L. 1945, pp. 137 et seq.). But the decision was predicated upon no such narrow ground and cannot be interpreted as holding that if this identical suit had been denominated one in equity a different result would have obtained. Looking at substance and disregarding slight differences in form, this suit is just as much a suit in equity to enjoin the Commissioner from enforcing against appellant laws claimed to be unconstitutional as to it as this suit would be if the complaint had not mentioned the Declaratory Judgments Act. If the complaint had not mentioned the Declaratory Judgments Act but had de-

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nominated the suit one in equity, it would have charged, as it now charges, that appellant was granted a charter by the Legislature of Georgia in 1833 containing a provision which limits the amount of ad valorem taxation which the State can enforce against it, that such charter constituted a contract between appellant and the State which can not be overridden by subsequent legislation or subsequently adopted provisions of the State Constitution, that the Commissioner was undertaking to collect ad valorem taxes from appellant to the same extent that he would have had a right to collect such taxes if appellant's charter contract had not contained the tax limitation provision by undertaking to enforce against appellant certain Georgia laws which do not exist as to it because they are violative of the contracts provision of the Federal Constitution, in view of appellant's charter contract, and the complaint would have sought, as the complaint now seeks, to enjoin the Commissioner from enforcing such unconstitutional laws.

The fact that the complaint, as a predicate for enjoining the Commissioner from enforcing the Georgia laws claimed by appellant to be unconstitutional as to it, prays the Court to "declare" that appellant's charter contract is inviolable, in the sense that it cannot be overridden by subsequently enacted legislation and by subsequently adopted provisions of the State Constitution, certainly does not prevent this suit from being in essence a suit in equity to enjoin the Commissioner as a wrongdoer. For, in order to grant appellant the primary relief which it seeks of enjoining the Commissioner from enforcing Georgia laws claimed unconstitutional as to appellant, the Court would necessarily have to "find" or "hold" or "declare" that the charter contract was inviolable in the sense that subsequent Georgia laws offensive to the Constitution of the United States could not override it, even though there were no prayer whatever in the complaint for a "declaration" to this effect. And had no mention been made of the Declaratory Judgments Act and had this suit been denominated a suit in

equity, the complaint would not in terms have asked the Court to "declare" what remedy appellant should pursue in the event of the Court's being of opinion that the relief sought could not be granted in the suit brought. Appellant simply would have alleged that it had no remedy at law which was plain, complete and beyond doubt, and, had the Court disagreed, it would have refused jurisdiction in equity on the ground that appellant had a remedy at law which the Court would have pointed out. The principle that equity will not take jurisdiction if there is an adequate remedy at law has been codified in Georgia, being Section 37-120, Georgia Code of 1933.

In a word, the complaint makes the same averments of fact, sets up the same constitutional claims, and seeks the same full and primary equitable relief which the complaint would have made, set up and sought, had the suit not mentioned the Declaratory Judgments Act, but had been expressly denominated a suit in equity. To consider this suit as being different in any essential respect from what it would be if the complaint had in terms labeled the suit as one in equity and had made no mention of the Declaratory Judgments Act, would be to give effect to form and to disregard substance and reality.

There is no basis, therefore, for any contention to the effect that this suit which is denominated a suit authorized by the Declaratory Judgments Act is a suit against the State as to which the State has not consented to be sued, but that a suit denominated one in equity making the same averments of fact, setting up the same constitutional claims and praying for the same full and primary relief, would not be a suit against the State but would be a suit against the Commissioner individually as a wrongdoer and would be maintainable. For, this suit sets up a cause in equity just as completely and effectively as though no Declaratory Judgments Act existed. And where no other remedy is available to test tax liability the policy of the Georgia law has always been to allow a taxpayer to resort to a suit in

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equity in the Superior Court (the Court in Georgia which has always exercised full equity jurisdiction) for such purpose. *Wright, comptroller-general, et al.* v. *The Southwestern Railroad Co.*, 64 Ga. 783; *Webb* v. *Newsom, sheriff*, 138 Ga. 342, 75 S. E. 106; *Gaulden* v. *Wright, comptroller-general*, 140 Ga. 800, 79 S. E. 1125; *Columbus Mutual Life Insurance Co.* v. *Gullatt, Tax Assessor, etc.*, 189 Ga. 747, 8 S. E. 2d 38.

III.

Since this suit exhausts equitable remedies and no other remedy exists, appellant is under compulsion to bring the present appeal to this Court on pain of a subsequent holding that failure now to appeal foreclosed appellant's constitutional claims.

It is for the very reason that this suit is in essence and reality a suit in equity seeking full and primary equitable relief against the Commissioner individually as a wrongdoer that appellant is under compulsion to seek review and reversal by this Court of the judgment of the Supreme Court of Georgia in this suit.

As shown in the jurisdictional statement, if appellant were to suffer this suit to be dismissed pursuant to the judgment of the Supreme Court of Georgia without seeking review of that judgment by this Court upon appeal, and if appellant were then to bring a suit expressly denominated a suit in equity (without mentioning the Declaratory Judgments Act) against the Commissioner as a wrongdoer to enjoin him from enforcing against appellant the offending laws, after having pursued successively the statutory remedies which appellee says are open to appellant for obtaining judicial determination of its constitutional claims only to have each declared non-existent by the Supreme Court of Georgia, the Commissioner would be expected to resist such new suit with a plea setting up as res judicata the

judgment of the trial court dismissing this suit pursuant to the judgment of the Supreme Court of Georgia.

The theory of such a plea of res judicata would properly be that this suit, though denominated an action under the Declaratory Judgments Act, was in essence and reality a suit in equity and, therefore, identical with the new suit praying for essentially the same relief as that prayed for in this suit, and that, since this suit had been held to be a suit against the State as to which the State had not consented to be sued, the new suit, being identical in character with this suit and praying for essentially the same relief would be just as much a suit against the State as this was and would be barred and precluded by the judgment in this suit. And, should the Supreme Court of Georgia sustain such a plea, then upon appellant's appealing to this Court from the judgment of the Supreme Court of Georgia, the Commissioner would be expected to take the position, and doubtless might do so successfully, that under the doctrine of *Angel* v. *Bullington*, 330 U. S. 183, appellant, by failing to seek review and reversal by this Court upon appeal of the judgment of the Supreme Court of Georgia in this suit, in accordance with the right so to do given by *General Oil Co.* v. *Crain*, supra, had forever lost its right to get this Court to reverse the Supreme Court of Georgia for denying appellant its constitutional rights by the device of holding that a suit in equity against the Commissioner as a wrongdoer is a suit against the State as to which the State has not consented to be sued.

Obviously, this Court would have no concern with the erroneous holding of the Supreme Court of Georgia that this is a suit against the State except for appellant's contention that such erroneous holding had the effect of upholding the Georgia laws claimed by appellant to be void as to it for repugnancy to the Constitution of the United States. The decision of the Supreme Court of Georgia had the claimed effect because, as the complaint shows, appellant has pursued in this suit the only remedy open

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to it which is plain, clear and free from doubt, with the result that the Supreme Court of Georgia has deprived appellant of its only adequate remedy. But in view of this claim which appellant makes, this Court is concerned with the erroneous holding of the Supreme Court of Georgia that this is a suit against the State, and this Court should take jurisdiction of this appeal under *General Oil Co.* v. *Crain*, supra, if this Court is shown that appellant has no other remedy which can meet the test of adequacy, as charged in the complaint.

It remains, therefore, for appellant to demonstrate that it has no remedy which meets the test of adequacy—no remedy which is plain, complete and beyond doubt—except the remedy on which this suit is based.

IV.

Demonstration that appellant has no other remedy.

1.

The three "ample remedies" suggested by appellee, all allegedly furnished by the Act of 1943, are either not open to appellant or do not exist.

The motion to dismiss or affirm contends "that the laws of Georgia provide ample remedies for such defenses as appellant might have." Such motion, construing it again most favorably to appellee, states that there are three of these "ample remedies." Appellee contends that all are furnished by the Georgia Act of 1943, approved February 17, 1943, (Ga. L. 1943, pp. 204 et seq., which Act is printed as Appendix I hereto, and will be referred to hereinafter as "the Act of 1943") and are: (a) direct appeal to the Superior Court from the ruling of the Commissioner; (b) appeal from the Commissioner to a Board of Arbitration and from that Board to the Superior Court; and (c) affidavit of illegality.

a.

Legislation to be reviewed.

Appellant contends that neither the first nor the second of these remedies is open to it for asserting its constitutional claims, and that the third does not exist.

To demonstrate that this is true it will be necessary for appellant to review at this juncture three Georgia statutes:

(1) An Act approved January 3, 1938, (Ga. L. Ex. Sess. 1937-38, pp. 77 et seq.) the pertinent portions of which are printed as Appendix II hereto. Such Act will be referred to hereinafter as "the Reorganization Act of 1938";

(2) An Act approved March 27, 1941, (Ga. L. 1941, pp. 200 et seq.), which is printed as Appendix III hereto and referred to hereinafter as "the Act of 1941";

(3) The Act of 1943, above referred to.

b.

The Reorganization Act of 1938 repealed all prior statutory remedies and substituted an exclusive remedy for contesting the Commissioner's rulings as to taxability.

The Reorganization Act of 1938 created the office of Revenue Commissioner and gave to him, among other taxing powers, all taxing powers relative to railroads and other public utilities. Prior to that time all taxing powers relative to railroads and other public utilities had been exercised by the Comptroller-General. The Reorganization Act of 1938 created a Board of Tax Appeals (Section 18) and provided that such Board should review assessments made by the Revenue Commissioner (Section 19). By Section 45 of that Act, taxpayers were given the right to appeal decisions made by the Board of Tax Appeals to the superior courts. The Supreme Court of Georgia (the highest Court of the State) held that the Board of Tax Appeals had jurisdiction to determine taxability of property, it having done so at the commencement of its opinion

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in the case of *Forrester, Revenue Commissioner*, v. *Pullman Company*, 192 Ga. 221, 15 S. E. (2d) 185, as follows:

> "A State Board of Tax Appeals, consisting of the comptroller-general, the auditor, and the treasurer, ex officio, was created by section 18 of the act approved January 3, 1938. Georgia L. Ex. Sess. 1937-1938, pp. 77 et seq. Section 19 of that act declares in part that 'The function of the Board of Tax Appeals shall be to review the assessments made by the State revenue commissioner when by such assessment, after hearing by the commissioner or his regularly authorized employee or agent, any taxpayer may be aggrieved and petition for said review.' Code Ann., Cumulative Part, § 92-8421. An examination of other portions of the act of 1938, particularly those sections now codified as §§ 92-8434, 92-8445, and 92-8447, discloses that the commissioner himself has the power to determine the taxability of property; and since it is made the function of the Board of Tax Appeals to review the assessments made by the commissioner, this should be held to include not merely the amount of the tax assessment, but also whether or not the particular property was taxable. Nothing decided by this court in *Columbus Mutual Life Insurance Co.* v. *Gullatt*, 189 Ga. 747, (8 S. E. 2d, 38) *Allied Mortgage Companies, Inc.* v. *Gilbert*, 189 Ga. 756 (8 S. E. 2d, 45), or *Gilbert* v. *Associated Mortgage Companies*, 189 Ga. 768 (8 S. E. 2d, 46), militates against this view. On the contrary, it was said arguendo in the opinion in the first of these cases that the Board of Tax Appeals was 'created by the act to settle disputes as to valuation and taxability,' a statement which in our judgment is correct."

And, as pointed out by appellee's motion to dismiss or affirm, the Georgia Court of Appeals (whose decisions are final unless reversed by the Supreme Court of Georgia on certiorari, the latter Court having discretion always as to whether certiorari should be granted) held in *Forrester, Revenue Commissioner* v. *Pullman Company*, 66 Ga. App. 745, 19 S. E. 2d 330, a case involving taxability, that the

method of reviewing tax assessments of the Commissioner prescribed by the Reorganization Act of 1938 was exclusive. That Court said:

> "The method of reviewing the tax assessment of the Commissioner of Revenue is prescribed by our Code, §§ 92-8445, 92-8446, and the procedure therein is exclusive, and no trial court shall have jurisdiction of proceedings to question such assessments, except as in this chapter provided. Generally, under these sections, an aggrieved taxpayer may, within 30 days from the date of the final assessment and notice thereof, file with the Board of Tax Appeals, a petition for review. The finding of the Board of Tax Appeals shall not be final, but either party may appeal from any order, ruling, or finding of the board to the superior court of the taxpayer's residence, 'unless the taxpayer be a railroad or other public service corporation or nonresident, in which event the appeal of either party shall be to the superior court of the county in which is located its principal place of doing business, or in which the chief or highest corporate officer, resident in the State, maintains his office.''

Thus, under the above holding of the Georgia Court of Appeals which appellee cites as controlling law in his motion to dismiss or affirm, all of the statutory remedies which existed prior to the passage of the Reorganization Act of 1938 were repealed by that act.

The Reorganization Act of 1938 has been twice amended, but it is seen that prior to amendment it afforded a remedy which would have enabled appellant to get judicial determination of the taxability of its property had the Commissioner undertaken to tax appellant beyond what is permitted by its charter contract before the Reorganization Act of 1938 was amended.

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c.

The Act of 1941 did not change as regards public utilities the exclusive remedy of the Act of 1938.

The Reorganization Act of 1938 was first amended by the Act of 1941. By the Act of 1941 the Board of Tax Appeals was abolished as to all assessments made by the Revenue Commissioner except "assessments entered by the State Revenue Commissioner on tax returns for ad valorem taxes required to be made to the State Revenue Commissioner. The procedure provided for by said Act of January 3, 1938, with respect to said assessments shall remain of full force and effect as provided thereby." Railroads and other public utilities were required, as above stated, to make their returns for ad valorem taxation to the Revenue Commissioner. Hence, the Act of 1941 abolished the Board of Tax Appeals as to all assessments made by the Tax Commissioner except assessments for ad valorem taxation made by him against railroads and other public utilities. The Act of 1941 provided that assessments made by the Commissioner against taxpayers of any other class could be appealed directly from the Tax Commissioner to the appropriate superior court. It will be seen, therefore, that, if the Commissioner had undertaken to disregard appellant's charter contract at a time when the Reorganization Act of 1938 stood amended only by the Act of 1941, appellant would have had a right to contest the taxability of its property beyond what is permitted by its charter contract by appealing from the Commissioner's assessment to the Board of Tax Appeals and from that Board to the superior court. But before the Commissioner undertook to tax appellant beyond what its charter contract permits the Reorganization Act of 1938 was again amended, this time by the Act of 1943.

d.

Summary of the provisions of the Act of 1943.

This Act of 1943 did the following: (1) entirely abolished the Board of Tax Appeals; (2) provided that "all final rulings, orders and judgments of the State Revenue Commissioner," except those relating to ad valorem assessments made by the Commissioner against public utilities (the term "public utilities" as used here and hereinafter is meant to include railroads), could be reviewed by the superior courts on direct appeal from the Commissioner; (3) provided that public utilities should *not* have, with respect to ad valorem assessments made against them by the Commissioner, the foregoing remedy of appeal from the Commissioner to the superior courts; (4) gave public utilities, with respect to ad valorem assessments made against them by the Commissioner, the right to appeal from the Commissioner to a Board of Arbitrators and to appeal from the awards of that board to the superior courts when the only objection urged against the Commissioner's assessment was that he had assessed the property in excess of its "true value or amount"; (5) added the following proviso to the provision referred to in (2) above by which taxpayers other than public utilities were granted the right of direct appeal from the Commissioner to the superior courts: "Provided, however, that nothing herein contained and no provision of this act shall be construed to deprive a taxpayer against whom an execution for taxes has been issued under an assessment by the State Revenue Commissioner of the right to resist the enforcement of same by affidavit of illegality."

e.

The arbitration and appeal feature of the Act of 1943 relates to value and not to taxability and furnishes appellant no remedy in situation here involved.

It is thus apparent that the Act of 1943 cut off from

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public utilities the remedy theretofore existing by virtue of the Reorganization Act of 1938 as it originally stood, and as it still stood after it was amended by the Act of 1941, namely, the remedy of having questions relating to taxability of property (as distinguished from questions relating solely to value) reviewed by the Board of Tax Appeals and then by the courts. The Act of 1943 gave to non-utility taxpayers the remedy of direct appeal to the superior courts from all assessments made against them by the Commissioner. That Act gave the same remedy to public utilities taxpayers as to all assessments made against them by the Commissioner, except assessments as to ad valorem taxability. As regards assessments as to ad valorem taxes made by the Commissioner against public utilities, the Act of 1943 gave that class of taxpayers the right to appeal to arbitrators and from their awards to the superior courts when and only when the question involved in a particular case relates to value. But the Act of 1943 makes no provision for public utilities to appeal from the Commissioner when the questions relate to taxability. There is plainly a hiatus in the Act of 1943 in that respect.

No sound argument can be made to the effect that the Act of 1943 intended that questions relating to ad valorem taxability of property of public utilities should be referred to the Board of Arbitration with the right of appeal from its award to the superior courts, because the plain words of the Act are that these taxpayers shall have the right "to refer the question of *true value or amount* to arbitrators as provided by Chapter 92-60 of the Code of Georgia of 1933." (Italics ours.) By referring to Section 92-6004, which is a part of Chapter 92-60, it will be seen that the oath to be taken by each arbitrator is that he "will diligently inquire as to the *value* of property and impartially decide the same, and will find and return the *true market value* thereof and of every part thereof according to the requirements of the law." (Italics ours.) Limiting the Board of Arbitration to the question of value and not giving

it the power to determine questions of taxability is in keeping with the policy of Georgia taxing statutes. *Columbus Mutual Life Insurance Co.* v. *Gullatt, Tax Assessor, etc.*, supra. That case held that a Georgia statute, using language less plainly that of limitation than the language used in the Act of 1943, had limited a Board of Arbitrators to questions of value. Since, therefore, the protection of appellant's claimed rights under the constitution of the United States involves taxability and not value, it is beyond question that the remedy of arbitration and appeal does not exist for the purpose of appellant's obtaining that protection.

f.

Having destroyed appellant's exclusive remedy to test taxability provided by the Reorganization Act of 1938, the Act of 1943 provided a remedy of direct appeal to the Superior Court open to appellant as to other taxes but not as to ad-valorem taxability.

It is equally plain that since appellant is a railroad and its question goes to ad valorem taxability and not value, the remedy of direct appeal from the Commissioner to the superior court does not exist as to appellant. This is true for the reason that the remedy of direct appeal, which is furnished by the Act of 1943 to non-utility taxpayers as regards *all* assessments made by the Commissioner against them, is furnished to public utility taxpayers *only as regards assessments made by the Commissioner against them for taxes other than ad valorem taxes.* For example, an assessment of State income taxes made by the Commissioner against a public utility is reviewable by direct appeal to the superior court.

g.

Proviso of the Act of 1943 furnishes no remedy.

It remains to be demonstrated that the third of the three

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"ample remedies" which the motion to dismiss or affirm contends are open to appellant for the protection of its constitutional claims does not exist. It will be recalled that this third remedy which appellee claims is open to appellant is the remedy by affidavit of illegality. Appellee contends that this remedy by affidavit of illegality is given by the proviso of the Act of 1943, which is, to quote it again: "Provided, however, that nothing herein contained and no provision of this act shall be construed to deprive a taxpayer against whom an execution for taxes has been issued under an assessment by the State Revenue Commissioner of the right to resist the enforcement of same by affidavit of illegality."

The remedy by affidavit of illegality is purely statutory. *Manning* v. *Phillips et al.*, 65 Ga. 549; *City of Atlanta* v. *Jacobs*, supra, 125 Ga. 523, at page 528; 54 S. E. 534, at page 536. Therefore, if a remedy by affidavit of illegality exists by virtue of the above proviso, such proviso must be construed either (a) as having preserved remedies by affidavit of illegality which already existed at the time of the passage of the Act of 1943, or (b) as having revived the remedies by affidavit of illegality which existed prior to the Reorganization Act of 1938, or (c) as having itself created a remedy by affidavit of illegality which would not exist except for such proviso. The motion to dismiss or affirm contends that such proviso affords appellant a remedy by affidavit of illegality which would enable it to get judicial determination of its constitutional claims, but the motion to dismiss or affirm does not venture an opinion as to just what remedy by affidavit of illegality appellant is afforded to that end by such proviso. In asserting that the proviso gives appellant a remedy by affidavit of illegality the motion to dismiss or affirm does no more than quote the proviso without pointing out whether such remedy is one existent at the time of the passage of the Act of 1943 and preserved by the proviso, or one existent at the time of the passage

of the Reorganization Act of 1938 and repealed by that Act but brought back into existence by the proviso, or one which the proviso itself creates.

(i)

The proviso did not preserve any existing remedy, for none existed to be preserved.

Appellant contends that the proviso, however construed, has given it no remedy at all for the following reasons: *Forrester* v. *Pullman Company*, supra, held that the Reorganization Act of 1938 repealed all remedies of every nature existing prior to the passage of that Act and substituted a completely new remedy for testing judicially the assessments of the Commissioner. And no Act has been passed since the passage of the Reorganization Act of 1938 which mentions affidavits of illegality except the Act of 1943. Hence, at the time of the passage of the Act of 1943, no remedy by affidavit of illegality existed by which assessments made by the Commissioner could be tested, with the result that the proviso cannot be construed as having preserved any remedy by affidavit of illegality which existed at the time of the passage of the Act of 1943.

(ii)

The proviso neither re-enacted any repealed remedy nor created a new remedy.

Nor can such proviso be construed either as having re-enacted any remedy by affidavit of illegality which had existed prior to the passage of the Reorganization Act of 1938 but which was repealed by that Act, or as having itself created a new remedy by affidavit of illegality. For the language of the proviso is: "that nothing herein contained and no provision of this Act *shall be construed* to deprive a taxpayer * * * of the right to resist * * * by affidavit of illegality." (Italics ours.) And this language exhibits no legislative intent of re-creation (re-enactment) of previously existing remedies or creation of any new remedy.

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Even if the proviso contained language purporting to create a new remedy by affidavit of illegality, none would be created because of the proviso's failure to confer jurisdiction on some court to try the issues made by it. Since remedy by affidavit of illegality is always the product of legislation, conferrence of jurisdiction on some court to entertain such remedy is essential to its creation. Recognition of this essential was shown by the Legislature in creating the remedies by affidavit of illegality which were repealed by the Reorganization Act of 1938, all of them having conferred jurisdiction on some court and having fixed venue. (These remedies by affidavit of illegality which the Reorganization Act of 1938 repealed will be dealt with hereinafter.)

Again, if a taxpayer in appellant's situation were to assume that a new remedy by affidavit of illegality had been created by the proviso, such taxpayer, in an effort to pursue such remedy, would have to speculate not only as to the court intended to have jurisdiction but also as to the venue intended, whether the county of its principal place of business, or the county in which the tax execution was attempted to be levied on its property, or the county of the Capitol of the State where the Commissioner's office is located.

In order for the Legislature to have *revived* the remedies by affidavit of illegality which had been repealed by the Reorganization Act of 1938, it would have been necessary for it to use language far clearer than that employed in the proviso. Assuming that the Legislature had the power to revive these remedies by reference, certainly the proviso makes no *express* reference to them, or to any of them. Even when it is certain that a statute has referred to repealed statutes its intent to revive them must be clear and manifest. "* * * legislative acts should not receive a construction operative to revive repealed statutes by a mere reference thereto, where such effect does not clearly appear

to have been the intention of the Legislature." 50 Amer. Juris., § 578, p. 574.

(iii)

Review of repealed remedies by affidavit of illegality.

Prior to the year 1931, the remedies by affidavit of illegality by which appellant could have contested the taxability of its property had the Comptroller-General (in whom, as will be recalled, was vested the taxing powers relative to public utilities prior to the Reorganization Act of 1938) undertaken to assess ad valorem taxes for back years against appellant's property for the benefit of the State, counties and municipalities, were as follows:

1. If a railroad had filed its returns with the Comptroller-General when they were due it could have availed, so far as the taxability of its property for State taxation was concerned, of the remedy by affidavit of illegality furnished by Sec. 92-2604 of the Georgia Code, which section is printed as Appendix IV hereto. But the Supreme Court of Georgia in the case of *Goldsmith, Comptroller-General*, v. *The Georgia Railroad Co.*, 62 Ga. 485, held that this remedy could not be availed of if the railroad had not made its returns to the Comptroller-General, and in the case of *Wright, Comptroller-General*, v. *The Southwestern Railroad Co.*, supra, 64 Ga. 783, that Court held (near bottom of page 793) that, in order for a railroad to avail of this remedy, it must have filed its returns with the Comptroller-General when they were due, that they could not be filed after they were due;

2. As regarded county taxes a railroad could have availed of the remedy by affidavit of illegality furnished by Section 92-2706 which section is printed as a part of Appendix IV hereto;

3. As regarded municipal taxation, a railroad could have contested the taxability of its property by an affidavit of illegality of the same character as that which would have

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applied in the case of county taxes, Section 92-2804 having made such remedy available in the case of municipal taxes.

In the year 1931 a State Revenue Commission was created by the Legislature (Ga. L. 1931, pp. 7 et seq.), and this Revenue Commission (which was abolished by the Reorganization Act of 1938) was given certain powers as to taxation, but the Comptroller-General continued to have the same powers relative to assessing railroads for State, county and municipal ad valorem taxation. (See as to this editorial note following Section 92-4506, Code of Georgia, Annotated.) Section 92-7301, which was codified from the Act of 1931 by which such Revenue Commission was created, is as follows: "In the case of any tax due the State or any tax assessed by the State Revenue Commission, whether so specifically provided in the law levying the tax or not, the Commission is empowered to issue an execution bearing teste in the name of the chairman of the Commission and directed to all and singular the sheriffs of this State, commanding them to levy upon the goods and chattels, lands, and tenements of the taxpayer, which execution it shall be the duty of any sheriff to execute as in case of writs of execution from the superior courts. Whenever any such writ of execution has issued, the taxpayer, in order to determine whether the tax is legally due, may tender to the levying officer his affidavit of illegality thereto; and upon the payment of the tax if required as condition precedent by the law levying the tax, and upon his giving a good and solvent bond for the eventual condemnation money in cases where the said law does not require the payment of the tax as a condition precedent, the levying officer shall return the same to the superior court of the county of the taxpayer's residence, except in case the law provides otherwise, and the same shall be summarily heard and determined by the court. (Acts 1931, pp. 7, 33.)"

It is to be noted that the remedy by affidavit of illegality provided for by Section 92-7301 (just quoted) could be applied only as regarded "any tax due *the State* or any tax

assessed by the State Revenue Commission." Therefore, since, as above pointed out, the Revenue Commission was not given any power of ad valorem taxation over railroads, if Section 92-7301 gave to railroads a remedy of affidavit of illegality with respect to ad valorem taxation, that section gave that remedy to them only as to ad valorem taxes claimed to be due *the State*. That section at most made available to railroads its remedy by affidavit of illegality only as regarded ad valorem taxes assessed by the Comptroller-General in favor of *the State*. It did not make available to railroads its remedy by affidavit of illegality as regarded ad valorem taxes assessed by the Comptroller-General in favor of the counties and municipalities.

Thus it is seen that prior to the Reorganization Act of 1938, but subsequent to the 1931 Act, in the event of effort on the part of the Comptroller-General to collect ad valorem taxes for back years, a railroad could have contested the taxability of its property as regarded State taxes by affidavit of illegality furnished by Section 92-2604 if it had filed its returns with the Comptroller-General on time. If it had not filed its returns with the Comptroller-General on time it may be that it could have resisted taxability as regarded State taxes by virtue of the remedy by affidavit of illegality furnished by Section 92-7301 (codified from the 1931 Act). And as regarded ad valorem taxes assessed against it for back years for the benefit of counties and municipalities, a railroad could have contested taxability by the remedy of affidavit of illegality furnished by Section 92-2706, that section specifically providing for affidavit of illegality in the case of county taxes, and, as above stated, Section 92-2804 having made that remedy also available in the case of municipal taxes.

(iv)

If proviso of Act of 1943 revived any repealed remedy, it revived one which furnishes appellant less than a complete remedy.

Referring again to the proviso of the Act of 1943, it is

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appellant's contention, for the reasons heretofore set forth, that such proviso did not revive any of the remedies by affidavit of illegality which were open to appellant prior to the Reorganization Act of 1938. But if there is room for any argument at all on this point,—if there could be accepted the assumption that by the proviso the Legislature attempted to revive any repealed statute providing a remedy by affidavit of illegality and if further there could be accepted the assumption that such attempt was effective—the only remedy by affidavit of illegality which the Legislature could be said with any plausibility at all to have intended to revive was that furnished by the 1931 Act (Section 92-7301). That was the only remedy by affidavit of illegality by which tax liability sought to be imposed by the old Commission could be tested which was open to taxpayers other than public utilities when the Reorganization Act of 1938 was passed. That remedy by affidavit of illegality was available to taxpayers other than public utilities with respect to "any tax due the State or any tax assessed by" the old Commission. And the argument would be that the Legislature, by placing the proviso at the end of the provision by which the Act of 1943 provided that taxpayers other than public utilities should have the right of direct appeal to the Court from assessment by the new Commissioner (the one whose office was created by the Reorganization Act of 1938), intended to revive the remedy by affidavit of illegality furnished by the 1931 Act in order that taxpayers other than public utilities might have a remedy for contesting tax executions issued by the new Commissioner even if they had not availed of remedy by direct appeal to the Court from his assessments. But, as above pointed out, if the 1931 Act gave the remedy by affidavit of illegality to public utilities, it gave it only with respect to taxes claimed to be due the State, and did not give it with respect to taxes claimed to be due the counties and municipalities. It follows, therefore, that if the remedy by affidavit of illegality given by the 1931

Act ever applied to public utilities prior to its repeal by the Reorganization Act of 1938, and if the Legislature intended to revive it by the proviso of the Act of 1943, and if its intent so to do was effective and not abortive, appellant still does not have a remedy to contest the taxability of its property as regards the county and municipal taxation involved in this suit.

(v)

The proviso did not amend an existing illegality statute not applicable to tax executions.

Referring finally to the proviso of the Act of 1943, appellant calls attention to this: Chapter 39-10 of the Georgia Code of 1933 provides a remedy by affidavit of illegality by which executions issued pursuant to judgments may be contested. But that remedy has several times been held not available to test a tax execution. In *City of Atlanta* v. *Jacobs*, supra, the Supreme Court of Georgia said at page 528 of 125 Ga.: "The general statutes embodied in the Civil Code [of 1895], § 4736 et seq. [such sections being 39-1001 et seq. in the Code of 1933] providing for an illegality proceeding as a means for arresting an illegal levy are confined to executions based upon judgments rendered by the courts." Appellee could hardly contend that the Legislature by the proviso of the Act of 1943 intended to amend this remedy by affidavit of illegality so as to make it apply to tax executions issued by the Commissioner.

2.

Statutory suit in equity was repealed by Reorganization Act of 1938.

Prior to the Reorganization Act of 1938, there was open to appellant a remedy by a statutory suit in equity by which it could have contested the taxability of its property as to State, county and municipal taxes in a single suit brought against the Comptroller-General in the Superior Court of

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Fulton County. Such remedy was given by Section 92-6104, that section being as follows: "If the delinquent under section 92-6102 [Section 92-6102 empowered the Comptroller-General to demand the return of property as to which there was delinquency by giving twenty days' notice in writing] disputes the taxability of such property, he may raise the question by petition in equity in the superior court of Fulton County, and if such delinquent is dead, his personal representative or representatives shall have the same right. (Acts 1918, p. 234.)" Had the Act approved July 31, 1918 (Ga. L. 1918, p. 232), from which Act Section 92-6104 was codified, never been passed, appellant doubtless would have had the same right to contest the taxability of its property in a single suit in equity brought in the Superior Court of Fulton County by virtue of the last sentence of Section 92-6803. Section 92-6803, together with the two preceding sections, which must be read for an understanding of Section 92-6803, are printed as a part of Appendix IV hereto. But, accepting, as does appellee, the decision of the Georgia Court of Appeals in *Forrester* v. *Pullman Company*, supra, as controlling, remedy by *statutory* suit in equity was repealed by the Reorganization Act of 1938.

V.

Since appellant has no remedy except as sought in this suit, and since courts cannot legislate, the decision of the Supreme Court of Georgia upheld the validity of the offending laws and this Court has jurisdiction.

If appellant had not proceeded by appeal to this Court, it would have found itself in the position of attempting to resist, by means of "remedies" which appellant does not believe exist, the effort of the Commissioner to tax its property under color of unconstitutional laws. Appellant cannot afford to, and should not be required to, speculate its property and its constitutional claims upon the remote pos-

sibility that, if appellant successively tried out each "remedy," the Supreme Court of Georgia, by a process of reasoning not now apparent to appellant, would hold that one of such "remedies" existed.

If, as appellant contends, and believes it has shown, appellant has no remedy other than the one on which this suit is based which meets the test of adequacy, then the effect of the decision of the Supreme Court of the State of Georgia has been to uphold the validity of the laws claimed unconstitutional as to appellant, and this Court has jurisdiction of the appeal under the doctrine of *General Oil Co.* v. *Crain*, supra.

VI.

This Court's decision in *Phyle v. Duffy* does not militate against appellant's position.

The Attorney-General of Georgia is of counsel for appellee and it is possible that this court will consider the statement in the motion to dismiss or affirm that appellant has "ample remedies" for asserting its constitutional claims as constituting the opinion of the Attorney-General. In the absence of controlling statute or authority, this Court ordinarily gives great weight to the opinion of the Attorney-General of a State as to the existence of a State remedy. *Phyle* v. *Duffy*, decided by this Court June 7, 1948, 68 S. Ct. (Adv.) 1131. The present appeal, however, is not one for application of the *Phyle* case. This is true for the following reasons:

The portion of the motion to dismiss or affirm which appellant has hereinabove liberally construed as undertaking to point out that appellant has three "ample remedies" for testing its constitutional claims is as follows:

> "Under the Act of 1943, pp. 204, 206, it is specifically provided that 'all final rulings, orders and judg-

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ments of the State Revenue Commissioner shall be subject to appeal and review' in the Superior Court. We quote the following from the same act:

> "'Provided, however, that nothing herein contained and no provision of this law (Sections 92-8426 (d) to 92-8426 (f) shall be construed to deprive a taxpayer against whom an execution for taxes has been issued under an assessment by the State Revenue Commissioner of the right to resist enforcement of the same by affidavit of illegality.'
>
> "Code Section 92-8426 (e) provides for plaintiff an adequate remedy at law—arbitration and appeal to the superior court."

Code references in the above quotation are all to Georgia Code Annotated, Cumulative Pocket Part, and upon examination it will be found that the sole source of such references is the Act of 1943. Hence, the conclusion of appellee that appellant has ample remedies is supported by neither argument nor judicial authority and amounts to no more than directing the attention of this court to the Act of 1943, which Act is itself a *controlling statute* as to appellant's having *no* remedy for disputing the ad valorem *taxability* of its property either (1) by direct appeal to the superior court from the Commissioner's ruling or (2) by the arbitration and appeal procedure set up for the purpose of resolving disputes as to value, as appellant has demonstrated. The plain words of the statute deny public utilities direct appeal from the Commissioner to the Court, and *Columbus Mutual Life Insurance Co.* v. *Gullatt,* supra, dealing with an analogous arbitration and appeal statute, is controlling authority against appellant's being furnished by the Act of 1943 the ability to test *taxability* by the arbitration and appeal procedure of the Act. And counsel for appellant submit that, in order for the proviso of the Act of 1943 to give a remedy by affidavit of illegality, the Appellate Courts of Georgia would have to legislate beyond filling in interstices.

D.

OTHER CONTENTIONS OF APPELLEE REFUTED.

One word more: The motion to dismiss or affirm, Paragraphs (B) and (D), asserts that the Supreme Court of Georgia, although it did not do so, could have reversed the trial judge for not having sustained appellee's general demurrer on grounds going to the merits. If appellee means to contend that this Court is without jurisdiction because of what is asserted in Paragraphs (B) and (D), the obvious answer is that if the Supreme Court of Georgia had based its decision upon the grounds urged in Paragraphs (B) and (D) of appellee's motion (but the State Supreme Court did not do so), this Court would plainly have jurisdiction, since, when there is a claim that a State statute impairs the obligation of a contract contrary to the Constitution of the United States, this Court is not bound by a State Court's decision as to whether there was a contract. Such was the holding of this Court in a case involving construction of the very contract which the Commissioner here seeks to impair. *Atlantic Coast Line R. Co.* v. *Phillips, State Revenue Commissioner*, 332 U. S. 168. And the contention made by appellee in Paragraph (C) of the motion, even if it were correct, would be fatal neither to this Court's jurisdiction nor to the suit on the merits.

We submit that the federal constitutional question raised is not only substantial but is entirely well taken; that this Court has jurisdiction; that the Motion to Dismiss or Affirm should be denied; and that the decision below should be reversed on the merits.

Respectfully submitted,

James E. Harper, Augusta, Ga.,
W. Inman Curry, Augusta, Ga.
Rembert Marshall, Atlanta, Ga.,
Counsel for Appellant.

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APPENDIX I.

The Act of 1943.

The Act of the General Assembly of Georgia, approved February 17, 1943, and published in Georgia Laws, 1943, pp. 204 et seq. is as follows:

An Act to amend an Act approved January 3, 1938, (Ga. Laws Ex. Session 1937-38, page 77), known as the Act creating the Department of Revenue, and providing for the administration of taxing laws, by fixing the salary of the State Revenue Commissioner; by abolishing the State Board of Tax Appeals; by providing for the discharge of the duties and functions of said Board; by providing for the assessment of property required to be returned for ad valorem taxation by certain corporations and companies to the State Revenue Commissioner; and for other purposes.

Be it enacted by the General Assembly of Georgia:

Section 1. That the Act of the General Assembly approved January 3, 1938 (Ga. Laws Ex. [sic] Section 1937-38, p. 77) entitled "An Act to make comprehensive provision for an integrated tax administration for Georgia; to create the Department of Revenue and the office of State Revenue Commissioner; to confer upon such commissioner all the powers and duties formerly vested in the State Revenue Commission and in the Comptroller General in relation to petroleum inspection, licenses and taxation; to abolish the State Revenue Commission; to continue the Comptroller General as Insurance Commissioner, Comptroller of Withdrawals, to provide for the appointment, term of office, salary, oath, bond, authority, duties and removal of the State Revenue Commissioner; to provide for the organization and operation of the department; to create the State Board of Tax Appeals; to provide for review by the Board of the assessments and equalization orders of the Commis-

sioner; to make appropriation for the Department and the Board; to provide for appeal to the Board from the Superior Courts; to enforce tax liability to other states which reciprocate; to repeal Code Sections 92-4507-9, 92-6001-7, 92-7004-6, Chapters 92-60, and 92-68 and laws in conflict with this Act; to provide for the administration of and the enforcement of the tax laws; and for other purposes," be and the same is hereby amended by striking from Chapter 11, Section 2, thereof the words and figures "Forty-eight hundred dollars ($4800.00)" and inserting in lieu thereof the words and figures "Six thousand dollars ($6000.00)," so that said Section 2 of Chapter 11 shall read as follows:

"Section 2. Creation of Department and Office. Salary, bond, oath. The office of State Revenue Commissioner and the Department of Revenue are hereby created. The Commissioner is hereby made head of the Department of Revenue. The Commissioner shall be appointed by the Governor with the consent of the Senate for a term of four years, provided, however, the first term beginning at the time of appointment and running to February 1, 1947. The Commissioner shall receive a salary of six thousand dollars ($6,000.00) annually, payable monthly. Before entering upon the performance of his duties he shall execute and file an official surety General and amounting to seventy thousand dollars ($70,000), the premium on which shall be paid by the State. The Commissioner shall be required to take and subscribe before the Governor an oath to discharge faithfully and impartially the duties of his office, which oath shall be in addition to that required of all civil officers."

Section 2. That said Act of January 3, 1938, be, and the same is hereby further amended by striking and repealing all of Sections 18, 19, 20, 21, 22, 23 and 24 of Chapter III thereof, which said sections create a State Board of Tax Appeals, and provide for the review of decisions of the

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State Revenue Commissioner, and substituting in lieu thereof new sections to be numbered section 18, section 19, and section 20, which shall read as follows:

"Section 18. Except as otherwise provided by this Act, all matters, cases, claims and controversies, of whatsoever nature arising in the administration of the revenue laws, or in the exercise of the jurisdiction of the State Revenue Commissioner or the Department of Revenue, as conferred by this act, shall be for determination by the State Revenue Commissioner, subject to review by the courts as provided for by Section 45 of Chapter IV of this Act. The effect of this section shall be that, except as hereinafter provided, all final rulings, orders and judgments of the State Revenue Commissioner shall be subject to appeal and review under Section 45 of this act in the same manner, under the same procedure, and as fully, as if same had been considered and passed upon by the State Board of Tax Appeals. Any such appeal from a final ruling, order, or judgment of the State Revenue Commissioner shall be entered within the time prescribed by Section 45 of the Act: Provided, however, that nothing herein contained, and no provision of this Act, shall be construed to deprive a taxpayer against whom an execution for taxes has been issued under an assessment by the State Revenue Commissioner of the right to resist enforcement of the same by affidavit of illegality.

All petitions for review filed and now pending before the Board of Tax appeals shall be and they are hereby declared to be in the same position as if the ruling, order, finding or assessment of the Commissioner therein complained of and sought to be reviewed had been affirmed by the Board of Tax Appeals; and all such rulings, orders, findings or assessments now pending for review before the Board of Tax Appeals shall be final and conclusive unless the taxpayer who filed said petition for review shall, within thirty (30) days from the date of the

passage of this Act, appeal said ruling, order, finding or assessment to the Superior Court in the manner provided by Code Section 92-8446, except that in the case of a foreign corporation domesticated in Georgia the appeal shall be made within the time herein prescribed to the Superior Court of the County in which such foreign corporation was domesticated in Georgia."

"Section 19. The provisions of the foregoing section with reference to reviewing assessments of the State Revenue Commission shall not apply to assessments for ad valorem taxation against any person, corporation or company which was required by Chapter 92-59 of the Code of 1933 to return his or its property for ad valorem taxation to the Comptroller-General and is now required by such chapter and this Act of January 3, 1938, to make such returns to the State Revenue Commissioner. The State Revenue Commissioner shall carefully scrutinize such returns made to him, and if in his judgment the property embraced therein is returned below its value or the return is false in any particular, or in any wise contrary to law, he shall, within sixty days thereafter, correct the same and assess the value, from any information available. If any such person, corporation or company shall be dissatisfied with the assessment or correction of such returns as made by the State Revenue Commissioner or the Department of Revenue, such taxpayer shall have the privilege, within twenty days after notice of such assessment and correction, to refer the question of true value or amount to arbitrators as provided for by Chapter 92-60 of the Code of Georgia of 1933. Such arbitrators shall consist of one chosen by the taxpayer and one chosen by the Governor. If the arbitrators thus chosen shall be in disagreement, they shall choose an umpire. If such arbitrators disagree and shall fail to select an umpire within thirty days after receiving notice of their appointment, the Chief Justice of the Supreme

Court of Georgia shall select an umpire. Every arbitrator or umpire chosen hereunder shall be a citizen of Georgia. The award shall be made by the arbitrators or by the arbitrators and the umpire, as the case may be, within thirty days from the appointment or selection of such umpire. The decision and award of the arbitrators or of the arbitrators and the umpire shall be subject to appeal and review in the same manner as decisions and orders of the State Board of Tax Appeals were subject to appeal and review under the terms of Section 45 of this Act."

"Section 20. Sections 92-7004 to 92-7006 of the Code of Georgia of 1933, which relate to arbitration of State Revenue Commission's equalization of county assessments are hereby repealed. Chapter 92-60 (Section 92-6001 to 92-6007) of the Code of Georgia of 1933, as modified by the provisions of the foregoing Section 19, shall continue and remain in full force and effect as if fully set forth herein."

Section 3. All laws and parts of laws in conflict with this Act are hereby repealed.

Approved February 17, 1943.

APPENDIX II.

The Reorganization Act of 1938.

The pertinent portions of the Act of the General Assembly of Georgia, approved January 3, 1938, and published in Georgia Laws, Extra Session, 1937-38, pp. 77 et seq., are as follows:

An Act to make comprehensive provision for an integrated tax administration for Georgia; to create the Department of Revenue and the office of State Revenue Commissioner; to confer upon such commissioner all the powers and duties formerly vested in the State Revenue Commission and in the Comptroller General in relation to petroleum inspection, licenses and taxation; to abolish the State Revenue Commission; to continue the Comptroller General as Insurance Commissioner, Comptroller of Withdrawals, to provide for the appointment, term of office, salary, oath, bond, authority, duties and removal of the State Revenue Commissioner; to provide for the organization and operation of the department; to create the State Board of Tax Appeals; to provide for review by the Board of the assessments and equalization orders of the Commissioner; to make appropriation for the Department and the Board; to provide for appeal to the Board from the Superior Courts; to enforce tax liability to other states which reciprocate; to repeal Code Sections 92-4507-9, 92-6001-7, 92-7004-6, Chapters 92-60, 92-61, and 92-68 and laws in conflict with this Act; to provide for the administration of and the enforcement of the tax laws; and for other purposes.

Chapter II. Department of Revenue, State Revenue Commissioner.

Section 2. Creation of Department and Office. Salary, bond, oath. The office of State Revenue Commissioner and

the Department of Revenue are hereby created. The Commissioner is hereby made head of the Department of Revenue. The Commissioner shall be appointed by the Governor with the consent of the Senate for a term of six years, * * *

Section 4. Powers and Duties, in General. The State Revenue Commissioner is hereby vested with all the power and authority and hereby required to perform all the duties formerly vested in the State Revenue Commission, and is hereby vested with all the power and authority and required to perform all the duties relating to matters of Petroleum Inspection, taxation, and licenses heretofore vested in the Comptroller General (except licenses to insurance companies and their agents) and he is also vested with all the power and authority and required to perform all the duties relating to taxation and licenses heretofore vested in any State administrative officer or State Department, but the powers and authorities by this section vested in the State Revenue Commissioner shall be the powers and authority of said Officers as modified, limited and enlarged by this Act.

Section 15. State Revenue Commission Abolished. The State Revenue Commission is hereby abolished, effective upon the approval of this Act.

Section 16. Certain Duties Retained by Comptroller General. Nothing contained in this Act shall be deemed to affect or impair the powers and duties of the Comptroller General with respect to controlling of withdrawals from the treasury, service as insurance Commissioner, or otherwise, in so far as the same do not concern taxation or licenses (other than licenses to insurance companies and their Agents).

Section 17. Repeal of Certain Code Sections. Sections 92-4507-92-4509, inclusive, of the Georgia Code of 1933, limiting the number of deputy commissioners to be appointed and their salaries, are hereby repealed.

Chapter III—Board of Tax Appeals.

Section 18. Membership, Chairman, Term, Salary, and Oath. There is hereby created a State Board of Tax Appeals of three members, consisting of the Comptroller General, State Auditor and the State Treasurer, ex-officio. Each member shall serve without additional compensation. The Board shall elect a chairman. Before assuming their duties, each shall be required to take and subscribe before the governor an oath to discharge faithfully and impartially the duties of his office, which oath shall be in addition to the oath required of all civil officers.

Section 19. Review of Individual Assessments, Costs. The function of the Board of Tax Appeals shall be to review the assessments made by the State Revenue Commissioner when by such assessment, after hearing by the Commissioner or his regularly authorized employee or agent, any taxpayer may be aggrieved and petition for said review. The manner of securing and conducting the review shall be as hereinafter set out, but no request to review the Commissioner's assessment shall in any event be granted unless objection has first been filed with the State Revenue Commissioner.

Section 20. Review of Commissioner's Equalization. The Board of Tax Appeals is also hereby required, on petition of any chairman of a County Board of Assessors who is dissatisfied with the changes and corrections in the county assessment ordered to be made by the State Commissioner in equalizing its taxable valuation, to review the action of the said Commissioner if the said assessor within ten days from receipt of the notice of the Commissioner's action shall request it in writing. The review shall be in all respects identical with the review provided for an aggrieved taxpayer except that no assessment of costs shall be necessary, and except that the application for review must be filed within the time hereinabove specified and the hearing fixed shall be within twenty days thereafter. If the decision of the Board shall be made and notice thereof conveyed to the

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County Tax Assessor, it shall be the duty of the said assessor immediately to review and correct the county valuations in the manner required by law.

Section 21. Power to make Rules of Procedure. By general orders not inconsistent with this Act and the laws of the State the Board shall promulgate rules governing its proceedings. Subject to such orders, any person may appear and practice before the Board in his own case or in a case involving his immediate family, or for a corporation of which he is an officer or regular employee, or an estate of which he is a fiduciary; but no persons other than members of the bar shall appear and practice before the Board in behalf of others.

Section 22. Power to Employ Assistants, Incur Expenses. The Board is hereby authorized to employ a secretary and such other personnel as may be required, and to incur such other expenses, within the limits of its appropriation, as in its discretion may be necessary to give effect to the provisions of this Act.

Section 23. Appropriation. There is hereby set aside from the funds appropriated for tax administration an amount (to be specified by the Governor) sufficient to pay the necessary expenses for operating the Board of Tax Appeals for the fiscal years ending June 30, 1938 and June 30, 1939.

Section 24. Repeal of Certain Code Sections. The following provisions of Title 92 ("Public Revenue") of the Georgia Code of 1933 are hereby repealed. Sections 92-6001-92-6007, inclusive, relating to arbitration of assessments or correction of returns made by the Comptroller General, and 92-7004-92-7006, inclusive, relating to arbitration of State Revenue Commission's equalization of County assessments.

Chapter IV—Administrative Provisions.

Section 25. In General. The State Revenue Commis-

sioner is hereby charged with the administration and supervision of all tax laws of the State. * * *

Section 44. Appeal from Commissioner's Findings. The Commissioner's assessments shall not be reviewed except by the procedure hereinafter provided; no trial court shall have jurisdiction of proceedings to question such assessments except as in this Act provided. If any taxpayer shall be aggrieved by any assessment which the Commissioner may make, he may within thirty (30) days from the date when the assessment is finally made and notice thereof given to the taxpayer file with the Board of Tax Appeals a petition for review. The request for review may be accompanied by a copy of the taxpayer's return as filed with the Commissioner and of any special accounting or other report thereon which the Commissioner may have made or required to be made. Both the Commissioner and the taxpayer shall have the right to introduce before the Board of Tax Appeals any evidence or data which said Board may rule to be pertinent or relevant, whether it was introduced originally before the Commissioner or not. The filing of any such petition shall not abate penalties for nonpayment unless such appeal is finally decided in favor of the taxpayer, nor shall it stay the right of the Commissioner to collect the tax which is admitted to be due, by any methods available to him under the law, unless the taxpayer shall furnish security of a kind and in amount satisfactory to the Commissioner. Where the Commissioner is required by law to certify to any county or municipal government of this State all or any part of an assessment or tax against any taxpayer, and the taxpayer disputes the correctness of said assessment or tax as determined by the Commissioner, the Commissioner is hereby directed to certify to said county and municipal government the value of the property of the taxpayer and/or the tax admitted by him in his return to be due, and after a final determination of the balance of said assessment or tax in dispute shall make a supple-

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mental certification to said counties and municipal governments of the amount of the balance of said assessment or tax as may be finally determined. It shall be the duty of the taxpayer to pay, as required by law, any taxes that may be assessed by the State, county or municipal governments, both upon the original value as shown in his return as well as upon its supplemental value that may finally be determined as in this Act provided.

Section 45. Review of Board's decisions. Jurisdiction of the Superior Courts. The findings by the Board of Tax Appeals shall not be final; but either party may appeal from any order, ruling, or finding of the said Board to the Superior Court of the county of the residence of the taxpayer unless the taxpayer be a railroad or other public service corporation or non-resident, in which event the appeal of either party shall be to the Superior Court of the County in which is located its principal place of doing business, or in which the chief or highest corporate officer, resident in the State, maintains his office. The appeal and necessary records shall be certified and transmitted by the Chairman of the Board and shall be filed with the Clerk of the Superior Court within thirty (30) days from the date of judgment by the Board. The procedure provided by law for applying for and granting appeal from the Court of Ordinary to the Superior Court shall apply as far as suitable to the appeal authorized herein, except that the appeal authorized herein may be filed within fifteen (15) days from the date of judgment by the Board.

Before the Superior Court shall have jurisdiction to entertain such appeal filed by any aggrieved taxpayer, such taxpayer shall file with the Clerk of the Superior Court a writing whereby such taxpayer shall agree to pay on the date or dates the same shall become due all taxes for which such taxpayer has admitted liability and shall within thirty (30) days from the date of judgment by the Board file with the Clerk of the Superior Court, except where appellant

owns real property in Georgia, the value of which is in excess of the amount of the tax in dispute, a bond in amount satisfactory to such Clerk or other security in amount satisfactory to such Clerk conditioned to pay any tax over and above that which the taxpayer has admitted liability for which shall be found to be due by a final judgment of court, together with interest and costs. It shall be ground for dismissal of the appeal if the taxpayer fails to pay all taxes admittedly owed upon the due date or dates as now or hereafter provided by law.

If the final judgment of court places upon the taxpayer any tax liability which he has not already paid, he shall pay the same on the due date or dates now or hereafter fixed by law if the tax or any of same has not become due on the date of said final judgment of court. And if the tax or any of same has already become due at the time of final judgment of court, the taxpayer shall immediately pay the tax or so much thereof as has already become due, with interest, and shall pay the court costs, in the event the final judgment of court is adverse to the taxpayer, no matter whether the tax or any part of same has or has not become due at the time of said final judgment of court.

Section 51. Be it further enacted that all laws and parts of laws in conflict herewith be and the same are hereby repealed.

Approved January 3, 1938.

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APPENDIX III

The Act of 1941.

The Act of the General Assembly of Georgia, approved March 27, 1941, and published in Georgia Laws, 1941, pp. 200 et seq. is as follows:

An Act to restrict and limit the jurisdiction of the State Board of Tax Appeals created and provided for by Chapter 3 of the act approved January 3rd, 1938, reorganizing the administration of the revenue laws of Georgia; to provide the disposition of cases, matters and controversies now pending before the State Board of Tax Appeals; and for other purposes.

Be it and it is hereby enacted by the General Assembly of Georgia:

Section 1. From and after the approval of this act the jurisdiction of the State Board of Tax Appeals created and provided for by Chapter 3 of the act approved January 3rd, 1938, entitled,

"An act to make comprehensive provision for an integrated tax administration for Georgia; to create the Department of Revenue and the office of State Revenue Commissioner; to confer upon such commissioner all the powers and duties formerly vested in the State Revenue Commission and in the Comptroller General in relation to petroleum inspection, licenses and taxation; to abolish the State Revenue Commission; to continue the Comptroller General as Insurance Commissioner, Comptroller of Withdrawals, to provide for the appointment, term of office, salary, oath, bond, authority, duties and removal of the State Revenue Commissioner; to provide for the organization and operation of the department; to create the State Board of Tax Appeals; to provide for review by the Board of the assessments and equalization orders of the Commissioner; to make appropriation for the Department and the Board; to

provide for appeal to the Board from the Superior Courts; to enforce tax liability to other states which reciprocate; to repeal Code Sections 92-4507-9, 92-6001-7, 92-7004-6, Chapters 92-60, 92-61 and 92-68 and laws in conflict with this Act; to provide for the administration of and the enforcement of the tax laws; and for other purposes," shall be limited to reviewing in the way and manner provided for by said act of January 3rd, 1938, assessments entered by the State Revenue Commissioner on tax returns for ad valorem taxes required to be made to the State Revenue Commissioner. The procedure provided for by said act of January 3rd, 1938, with respect to such assessments shall remain of full force and effect as now provided thereby.

Section 2. All cases, matters, claims and controversies of whatsoever nature except those relating to the assessments of which jurisdiction in the State Board of Tax Appeals is retained by this act shall, upon the approval of this act, be recommitted to the State Revenue Commissioner who shall thereupon proceed to pass upon and determine any questions therein presented or involved. Any such ruling by the State Revenue Commissioner shall be subject to review by the courts as now provided for by said act of January 3rd, 1938, as fully as if such rulings had been reviewed by the State Board of Tax Appeals.

Section 3. The time during which any such matter, case or controversy as prior to the approval of this act pended before the State Board of Tax Appeals shall be excluded from computation in determining whether any appeal from such assessment or ruling made thereon is barred by the statute of limitations prescribed by any revenue law.

Section 4. All laws or parts of laws in conflict with this act are hereby repealed.

Approved March 27, 1941.

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APPENDIX IV.

Sections 92-2604, 92-2706, 92-6801, 92-6802, and 92-6803, of the Code of Georgia of 1933 (the official legislative code of Georgia) are as follows:

92-2604. (1034) Illegality to resist tax; venue.—If any railroad company affected by the preceding sections desires to resist the collection of the tax therein provided for, said company through its proper officer may, after making the return required in section 92-2602, and after paying the tax levied on such corporation and continuing to pay the same while the question of its liability herein is undetermined, resist the collection of the tax above provided for, by filing an affidavit of illegality to the execution or other process issued by the Comptroller General, stating fully and distinctly the grounds of resistance, which shall be returnable to the superior court of Fulton county, to be there determined as other illegalities; the same to have precedence of all cases in said court as to time of hearing, and with the same right of motions for new trial and writs of error as in other cases of illegality, in which case the Comptroller General shall be represented by the Attorney General of the State. If the grounds of such illegality are not sustained, the Comptroller General shall, after crediting the process aforesaid with the amount paid, proceed to collect the residue due under the provisions aforesaid; and if, at any time during the pendency of any litigation herein provided for, the said corporation shall fail to pay the tax required to be paid as a condition of hearing, said illegality shall be dismissed, and no second affidavit of illegality shall be allowed. Said illegality may be amended as other affidavits of illegality, and shall always be accompanied by good bond and security for the payment of the tax execution issued by the Comptroller General. (Acts 1874, p. 107; 1931, pp. 7, 38.)

92-2706. (1041) Affidavit of illegality to resist tax.—If any railroad company desires to dispute its liability to such county tax, it may do so by an affidavit of illegality, to be made by the president of said railroad or other officer thereof having knowledge of the facts in the same manner as other affidavits of illegality are made, and shall be returned for trial to the superior court of the county where such tax is claimed to be owing and where it is sought to be collected, where such cases shall be given precedence for trial over all other cases, except tax cases in which the State shall be a party. (Acts 1889, p. 29; 1916, p. 34; 1927, p. 136.)

92-6801. Taxes, how assessed and collected.—In all cases where taxes are authorized for any purpose and no adequate provision is made in the law authorizing the same or in the general law for giving the taxpayer notice and opportunity to be heard as to the valuation and taxability of his property, the method of assessing and collecting said taxes shall be as set forth in this Chapter. (Acts 1910, p. 22.)

92-6802. Assessment by the Comptroller General. Arbitration.—Where the property subject to said tax is such as is returnable to the Comptroller General he shall assess the same at the valuation fixed in the annual returns, if said returns are satisfactory to him; if not, he shall within 60 days after receiving said returns make an assessment of the property from the best information he can procure, and notify in writing the officer or person making such returns, who shall have the privilege within 20 days after receiving such notice, to refer the question of true value to arbitrators, one to be chosen by himself, and one to be chosen by the Comptroller General, with power in the two so chosen to choose an umpire in case of disagreement; and their award shall be final. (Acts 1910, pp. 22, 23.)

92-6803. School tax.—In all such cases where the taxes are authorized for school purposes in the counties

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or school districts, the taxpayer's annual returns to the Comptroller General shall set forth all his taxable property in said county or school district, as the case may be, subject to said taxation, and the Comptroller General shall assess the said property for school purposes at the same time and in the same manner as he is authorized by law to assess the same for ordinary county purposes, applying the school-tax rate fixed by the school authorities in said counties or districts, which said school-tax rate or rates shall be certified and transmitted to the Comptroller General by the county authorities at the same time they certify to him the county tax rate for ordinary county purposes in cases of railroad property, and the further procedure, on the part of the Comptroller General for collecting said school tax shall be the same as that providing for the collection of county taxes due by railroads as provided for in sections 92-2701 to 92-2706, both inclusive, in so far as the same can be applied. Where it becomes necessary for the Comptroller General to issue a tax fi. fa. for county purposes, as well as for school purposes, he may include said school tax therein, specifying in the assessment and tax execution the amount of the county taxes for ordinary purposes and the amount for school purposes, separately, so that the tax collector, after collecting the same, shall pay over each tax to the proper person authorized by law to receive the same. Should the taxpayer desire to contest the taxability of his property, as provided under this and the preceding section, he may do so by petition in equity in the superior court of Fulton county. (Acts 1910, pp. 22, 23.)